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No. 82-345

In the Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD COOPER, CITY ATTORNEY OF THE CITY OF SANTA ANA,

Petitioner,

vs.

MITCHELL BROTHERS' SANTA ANA THEATER, located at 1565 West 17th Street, Santa Ana, County of Orange, California; M.B.F.G. THEATER CIRCUIT, INC.; JIM GISH; ALLISON HONER CO., a partnership; UNITED ARTISTS THEATER CIRCUIT, INC.; CONTINENTAL AUXILIARY COMPANY, a California Corporation; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association; JAMES MITCHELL; ARTIE MITCHELL; DEMICH, INC., a California Corporation; MITCHELL BROTHERS FILM GROUP, a General Partnership; CINEMA 7, INC., a California Corporation; Does 1 through 100, inclusive,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

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SUBJECT INDEX

Page

REPLY AND SUPPLEMENTAL BRIEF..... 1

ARGUMENT..... 4

I

THIS COURT'S DENIAL OF ITS WRIT OF CERTIORARI AS TO QUESTIONS 1 (CLOSURE) AND QUESTION 3 (DUE PROCESS AND EQUAL PROTECTION OF THE LAW) IN EDWARD COOPER V. MITCHELL BROTHERS' SANTA ANA THEATER, ET AL. ON NOV. 30, 1981, WHILE AT THE SAME TIME GRANTING ITS WRIT AS TO QUESTION 2 (BURDEN OF PROOF) AND SUMMARILY REVERSING THE COURT OF APPEAL'S JUDGMENT THEREIN, IMPORTS NO EXPRESSION OF OPINION UPON THE MERITS OF QUESTIONS 1 AND 3 AS AGAIN PRESENTED TO THIS COURT IN THE PETITION HEREIN UPON ADDITIONAL FACTS..... 4

II

THE CALIFORNIA COURT OF APPEAL'S DECISION BELOW PRESENTS A NUMBER OF SUBSTANTIAL SUBSIDIARY FEDERAL QUESTIONS..... 8

(A) The Court Of Appeal's Opinion Violates The U.S. Constitution By Ignoring The Provisions Of Santa Ana Ordinance N.S. 1325, §12-102(a)(1) Which Make Any . . . Place In The City Of Santa Ana Where (1) Lewd Films Are Publicly Exhibited As A Regular Course Of Business . . . A Public Nuisance Per Se..... 8

(B) The Court Of Appeal's Opinion Violates The U.S. Constitution By Denying The City Attorney, Acting For And On Behalf Of The Residents Of Santa Ana, The Right To Recover Damages From The Public Nuisance Which Has Been Established. Such Denial Constitutes A Taking Of Property Without Due Process Of Law..... 13

(C) Civil Code Section 3496 Enacted Into Law Subsequent To The Filing Of The Petition For Writ Of Certiorari Herein States In Explicit Language What Implicitly Has Been The Law In California Up To The Decision Of The Court Of Appeal Below And Confirms Petitioner's Arguments That The Trial Court Was Correct In Its Award Re An Attorney's Fee And That The City Attorney Is Entitled To An Award Of Attorney's Fee Under California Civil Code §1021.5 (Private Attorney-General Fee Award)..... 15

CONCLUSION..... 20

INDEX TO APPENDICIES

APPENDIX

A Point III (pgs. 10-13) of Petitioner's Reply and Supplemental Brief in People ex rel. Cooper, City Attorney of the City of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, No. 81-271, filed on Nov. 19, 1981..... A1-3

B Point III (pgs. 38-43) of Plaintiff's Petition for Hearing in the California Supreme Court, filed on Mar. 28, 1982..... B1-10

C Point II (pgs. 33-38) of Plaintiff's Petition for Hearing in the California Supreme Court, filed on Mar. 28, 1982..... C1-9

CASES

Cooper v. Mitchell Brothers' Santa Ana Theater, et al., No. 81-271, 70 L.Ed.2d 262 (11/30/81), 3, 4

Harmer, et al. v. Deep Thr[illegible] 430 U.S. 907,.... 20

Harmer, et al. v. Devil in Miss Jones, 430 U.S. 937,..... 20

Newark Health and Welfare Dept. v. Rogers, 179 N.J.Super. 389, 432 A.2d 135,..... 18

People of the State of California v. Beaudry, 91 Cal. 213 (9/16/1891),..... 18

People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 42 ('976),..... 10

People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, et al., 128 Cal.App.3d 937 (2/18/82),..... 3

People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, et al., No. 81-271,..... 5

People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, et al., 114 Cal.App.3d 923 (1/20/81),..... 3

U.S. Marketing, Inc., et al. v. State of Idaho ex rel. Kidwell, et al., No. 81-741, 71 L.Ed. 2d 291 (1/11/82),..... 6, 7

United States V. Shubert, 348 U.S. 222,..... 5

Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles, et al., 23 Cal.3d 917 (Apr. 3, 1979),..... 2, 3, 17

CODES, ORDINANCES, RULES AND STATUTES

California Code of Civil Procedure:
§ 731,..... 19
§ 1021.5,..... 15, 16, 17, 18

California Civil Code:
§ 5,..... 19
§ 21,..... 19
§3479,..... 10
§3480,..... 10
§3493,..... 20
§3496, added by Statutes of 1982, Ch. 1267 (S.B. 1720), eff. date: 1/1/83 ..... 2, 3, 15, 16, 17

California Government Code:
§38773,..... 16, 17, 19
§38773.5,..... 16, 17, 19

California Peral Code:
§ 370,..... 10

Santa Ana Ordinances:
N.S. 1287,..... 10, 11, 19
N.S. 1325, §12-102(a)(1)..... 8, 10, 11

United States Supreme Court Rules:
Rule 21.1(a)..... 9
Rule 22.5,..... 1
Rule 22.6,..... 1
Rule 53,..... 7

TEXTS

Statutory Construction, Sutherland, Vol. 2A, §51.03,..... 17

Supreme Court Practice, Stern and Gressman, 5th Edition,
pages 353-360 (1978),..... 4, 5
page 790,..... 8

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EDWARD COOPER, CITY ATTORNEY OF THE CITY OF SANTA ANA,

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MITCHELL BROTHERS' SANTA ANA THEATER, located at 1565 West 17th Street, Santa Ana, County of Orange, California; M.B.F.G. THEATER CIRCUIT, INC.; JIM GISH; ALLISON HONER CO., a partnership; UNITED ARTISTS THEATER CIRCUIT, INC.; CONTINENTAL AUXILIARY COMPANY, a California Corporation; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association; JAMES MITCHELL; ARTIE MITCHELL; DEMICH, INC., a California Corporation; MITCHELL BROTHERS FILM GROUP, a General Partnership; CINEMA 7, INC., a California Corporation; Does 1 through 100, inclusive,

Respondents.

On Petition for a Writ of Certiorari
to the California Court of Appeal,
Fourth Appellate District

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

Pursuant to Rules 22.5 and 22.6 of the U.S. Supreme Court Rules, Petitioner files the following Reply and Supplemental Brief

to the Respondents' Brief in Opposition herein.

The supplemental portion of Petitioner's brief is addressed to new legislation; namely, Civil Code §3496, added by Statutes of 1982, Chapter 1267 (S.B. 1720), enacted by the California State Legislature subsequent to the date on which the Petition for Writ of Certiorari herein was filed. Civil Code §3496, which was signed into law by Governor Edmund Brown, Jr. on September 20, 1982, and will become effective on January 1, 1983, reads as follows:

> SECTION 1. Section 3496 is added to the Civil Code to read:
>
> 3496. In a case in which the court enjoins the sale, distribution, or public exhibition, for commercial consideration, of obscene matter, as defined in Section 311 of the Penal Code, the court may award costs to the prevailing government agency which brought the action. Such costs may include the costs of investigation and reasonable attorney fees. (Our emphasis.)

Under the rule of law expressed by Justice Tobriner in Woodland Hills Residents Assn.,

Inc. v. City Council of Los Angeles, et al., 23 Cal.3d 917 at 929-932, 154 Cal.Rptr. 503 at 508-510 (Apr. 3, 1979), Civil Code §3496 (legislation on attorney fees) applies retrospectively to all cases in which an appeal has not been finally determined when the statute becomes effective (Jan. 1, 1983). Petitioner contends that Civil Code §3496 states in explicit language what implicitly has been the law in California up to the Court of Appeal's decision herein in People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, et al., 114 Cal.App.3d 923 (Jan. 20, 1981), reversed and remanded on "Burden of Proof" Question in Cooper v. Mitchell Brothers' Santa Ana Theater, et al., No. 81-271, ___ U.S. ___, 70 L.Ed.2d 262, 102 S.Ct. 272 (Nov. 30, 1981); reiterated, in part, in People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, et al., 128 Cal.App.3d 937 (Feb. 18, 1982).

ARGUMENT

I

THIS COURT'S DENIAL OF ITS WRIT OF CERTIORARI AS TO QUESTIONS 1 (CLOSURE) AND QUESTION 3 (DUE PROCESS AND EQUAL PROTECTION OF THE LAW) IN EDWARD COOPER V. MITCHELL BROTHERS' SANTA ANA THEATER, ET AL. ON NOV. 30, 1981, WHILE AT THE SAME TIME GRANTING ITS WRIT AS TO QUESTION 2 (BURDEN OF PROOF) AND SUMMARILY REVERSING THE COURT OF APPEAL'S JUDGMENT THEREIN, IMPORTS NO EXPRESSION OF OPINION UPON THE MERITS OF QUESTIONS 1 AND 3 AS AGAIN PRESENTED TO THIS COURT IN THE PETITION HEREIN UPON ADDITIONAL FACTS.

Respondents' contention at Proposition I of their opposition (see Respondents' Brief in Opposition at page 4) that "The Questions Presented Have Already Been Ruled On By This Court In This Case" is without merit. The general rule is that a simple order denying a petition for writ of certiorari as to a federal question is not designed to reflect the Court's views either as to the merits of the case or as to its jurisdiction to hear the matter. See, Stern and Gressman, Supreme Court Practice, Fifth Edition, pp. 353-360 (1978). As is noted in

the Stern and Gressman text at p. 353, this absence of precedential value as to the denial of certiorari is particularly appropriate where the decision sought to be reviewed is essentially a factual determination, United States v. Shubert, 348 U.S. 222, 229 n. 10. Here, the facts show that Petitioner was accorded complete relief in his first Petition and the Court of Appeal's judgment was summarily reversed on another issue.

Petitioner filed his first Petition for Writ of Certiorari in Docket No. 81-271, People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, et al., on August 10, 1981. Subsequently, in his Petitioner's Reply and Supplemental Brief, filed in the same case on or about Nov. 19, 1981, Petitioner called this Court's attention to the fact that the "closure" issue in Question 1 was now also before the U.S. Supreme Court for decision in the

jurisdictional statement in Docket No. 81-741, U.S. Marketing, Inc. v. State of Idaho ex rel. Kidwell, et al., filed on October 15, 1981, and requested that the Court not rule upon his Petition for Writ of Certiorari until it considered the jurisdictional statement in the Idaho appeal.[1] Although a majority of this Court decided on Nov. 30, 1981 to act immediately and grant the Writ on Petitioner's Question 2 and reverse the Court of Appeal judgment below summarily, the failure of that same majority to also act on Question 1 (closure) cannot, under the accompanying circumstances, be construed as a ruling against the Petitioner on the merits of Question 1. Further, this Court did note jurisdiction on the "closure" issue six weeks later in Docket No. 81-741, U.S. Marketing, Inc., et al. v. Idaho et al., ___ U.S. ___, 71

[1] See Petitioner's Reply and Supplemental Brief in No. 81-271 at pages 10-13, a copy of which pages is attached hereto at Appendix "A".

L.Ed.2d 291, ___ S.Ct. ___ (Jan. 11, 1982), thereby finding the "closure" issue to present a substantial federal question which was ripe for review.

Thereafter, when this Court was precluded from ruling on the "closure" issue by U.S. Marketing, Inc.'s voluntary dismissal of their appeal under Rule 53 on March 10, 1982, Petitioner attempted to again bring the "closure" issue before this Court in his Motion for Leave To File Out-of-Time Petition for Rehearing, With Petition for Rehearing Annexed. In that motion, filed with this Court on March 14, 1982, Petitioner alleged as an intervening circumstance of substantial effect, and grounds therefore, this Court's having noted jurisdiction on the "closure" issue on Jan. 11, 1982 in U.S. Marketing, Inc., et al., supra. As in the case of the denial of the first Petition for Writ of Certiorari as to Question 1, above noted, Respondents

similarly contend that the denial of such motion on April 5, 1982 weighs against Petitioner's claim of an "intervening circumstance" (see Brief in Opposition at page 4). That contention is also without merit and for a similar reason to that given above. In view of the statistics, which recount an overwhelming lack of success, generally, with Petitions for Rehearing, see Stern and Gressman, Supreme Court Practice, Fifth Edition, page 790, the denial of such motion cannot be claimed to weigh against either Petitioner's claim of a "changed circumstance" or the merits of the "closure" issue as presented herein in Docket No. 82-345.

II

THE CALIFORNIA COURT OF APPEAL'S DECISION BELOW PRESENTS A NUMBER OF SUBSTANTIAL SUBSIDIARY FEDERAL QUESTIONS.

(A) The Court Of Appeal's Opinion Violates The U.S. Constitution By Ignoring The Provisions Of Santa Ana Ordinance N.S. 1325, §12-102(a)(1) Which Make Any . . . Place In The City Of Santa Ana Where (1) Lewd Films Are Publicly Exhibited As A Regular Course Of Business . . . A Public Nuisance Per Se.

Respondents argue (see Brief in Opposition at page 6): "The decision is based on the legislation involved, and not on any federal question." In their attempt to paint the opinion of the Court of Appeal below as simply presenting a matter of state law, against Petitioner's claim that substantial federal questions have been raised involving a denial of due process of law and equal protection of the law and a Constitutionally inadequate judicial remedy (Question 2), Respondents have framed a subsidiary question of their own. See "Questions Presented" at Question 2 of the Brief in Opposition, reading:

> "2. Whether California violates the United States Constitution by defining only the exhibition of obscene motion pictures as a public nuisance, and not the theater where such pictures are shown, nor the films themselves?" 2/

2/ Respondents have made the above issue a part of their defense to the Petition for Writ of Certiorari herein. Petitioner's Reply is directed to Respondents' Question 2 as a "subsidiary question fairly included" within Petitioner's Question 2. See Rule 21.1(a) of the Rules of the U.S. Supreme Court.

Respondents assert as an affirmative proposition to their "straw man" Question that (Brief in Opposition at page 6):

> "A. Under California's Public Nuisance Statutes, as Construed by the California Courts, It Is The Exhibition of Obscene Motion Pictures Which Constitutes The Nuisance, and not the Theater Where Shown Nor The Films Themselves."

After citing People ex rel. Busch v. Projection Room Theater, (1976) 17 Cal.3d 42, 51-52 and 57 in support of that proposition, Respondents conclude:

> "There is certainly no federal question as to whether California has the right to make its own definition of what a public nuisance is." (Brief in Opposition at page 7.)

If the record were merely that which is stated above, Respondents' "straw man" defense might have merit, but such is not the case. There is no question but that the Busch decision says exactly what Respondents claim it says as to Civil Code §3479 and §3480 and Penal Code §370, but the record also shows that Santa Ana Ordinances N.S.

1287 and N.S. 1325, §12-102(A)(1) (see Appendix at B-100 and B-122) has further legislatively declared that:

> "Any . . . place in the City of Santa Ana where . . . (1) lewd films are publicly exhibited as a regular course of business . . . is a public nuisance per se."

Further, the public nuisance complaint alleged that the City Council had acted by Resolution to declare the place a public nuisance and in violation of Ordinance N.S. 1325 (see Petition for Writ of Certiorari at page 13).

The variance between the Court of Appeal's opinion on the point which Respondents have raised above and the record herein, regarding the Santa Ana Ordinances and arguments thereon (which the California Court of Appeal opinion ignored), was framed as Question 3 of the Reasons for Granting a Hearing in the Santa Ana City Attorney's Petition for Hearing filed in the California Supreme Court on March 28, 1982, reading as

follows:

> " Whether the Court of Appeal's refusal to enforce Santa Ana Ordinances N.S. 1287 and 1325 (which declare places exhibiting obscene films within the City and prints used to exhibit obscene films within the City to be a public nuisance), enacted pursuant to the specific grant of authority to cities in Government Code Section 39771 to declare what constitutes a public nuisance and to provide for a procedure to abate such public nuisance, was arbitrary and is a usurpation of the legislative power of the City of Santa Ana."

Petitioner's arguments as to Question 3 of the Reasons for Granting a Hearing appeared as Point III in the Petition for Hearing in the California Supreme Court at pages 38 et seq. A copy of that portion of the record below is set forth at Appendix "B" to this Reply and Supplemental Brief.

Petitioner submits that the record noted above, appearing herein at Appendix "B", does not permit the Respondents to assert the defensive proposition set forth in Point IIA of their Brief in Opposition.

(B) The Court Of Appeal's Opinion Violates The U.S. Constitution By Denying The City Attorney, Acting For And On Behalf Of The Residents Of Santa Ana, The Right To Recover Damages From The Public Nuisance Which Has Been Established. Such Denial Constitutes A Taking Of Property Without Due Process Of Law.

Respondents further assert as an affirmative proposition in support of their "straw man" Question (see Brief in Opposition at page 7):

> "2B. In California Nuisance Actions, Money Damages Are Not Permitted Where The Plaintiff Is A Public Official."

and refer to that part of the Court of Appeal's opinion reading:

> "It is clear that the Legislature intended that one type of litigant could seek abatement and damages, while the other type of litigant could obtain abatement only. A city attorney, in an action, 'brought in the name of the People,' fits squarely and exclusively in the latter classification." Id., 114 Cal.App.3d at 930.

The variance between the Court of Appeal's opinion on the point which Respondents have raised above and ruling case law in California (which the Court of

Appeal's opinion ignored), was framed as Question 2 of the Reasons for Granting a Hearing in the Santa Ana City Attorney's Petition for Hearing filed in the California Supreme Court on March 28, 1982, reading as follows:

> " 2. Whether monetary damages (nominal, compensatory and punitive) may be recovered in a cause of action to abate a public nuisance under Civil Procedure Section 731, brought by the City Attorney at the direction of the City Council."

Petitioner's arguments as to Question 2 of the Reasons for Granting a Hearing appeared as Point II in the Petition for Hearing in the California Supreme Court at pages 33 et seq. A copy of that portion of the record below is set forth at Appendix "C" to this Reply and Supplemental Brief.

Petitioner submits that the record noted above, appearing herein at Appendix "C", does not support the Respondents' defensive proposition set forth in Point IIB of their Brief in Opposition. The Court of

Appeal's opinion, by refusing to acknowledge prior precedent and follow elementary rules of stare decisis, invalidates that portion of the opinion as an ipse dixit expression and a denial of due process of law.

(C) Civil Code Section 3496 Enacted Into Law Subsequent To The Filing Of The Petition For Writ Of Certiorari Herein States In Explicit Language What Implicitly Has Been The Law In California Up To The Decision Of The Court Of Appeal Below And Confirms Petitioner's Arguments That The Trial Court Was Correct In Its Award Re An Attorney's Fee And That The City Attorney Is Entitled To An Award Of Attorney's Fee Under California Civil Code §1021.5 (Private Attorney-General Fee Award).

In the Petition for Writ of Certiorari herein at Point IIA, pp. 56-60, Petitioner contended that that part of the Court of Appeal's opinion which reversed the trial court's judgment relating to attorney's fees was erroneous and that its failure to acknowledge rights accruing to the City Attorney under C.C.P. §1021.5 (private attorney-general fee award) was a denial of equal protection of the law. Specifically,

Petitioner contended that the exclusion in C.C.P. §1021.5 as to "public entities" did not apply where the City Attorney acted as a plaintiff (rather than a defendant) on behalf of the residents in a specific geographical location in an "environmental protection" lawsuit. Further, it was contended that if the interpretation were otherwise, such exclusion constituted a violation of equal protection of the law in that the City Attorney could not be excluded under a "rational" equal protection classification. (See Petition for Writ of Certiorari at pp. 56-62). See Govt. Code §38773 and §38773.5 (Petition for Writ of Certiorari at Appendix F-7, F-8).

Subsequent to the filing of the Petition for Writ of Certiorari herein, the California State Legislature enacted and the Governor has signed into law Senate Bill 1720 which provides as follows:

SECTION 1. Section 3496 is added to the Civil Code, to read:

> 3496. In a case in which the court enjoins the sale, distribution, or public exhibition, for commercial consideration, of obscene matter, as defined in Section 311 of the Penal Code, the court may award costs to the prevailing government agency which brought the action. Such costs may include the costs of investigation and reasonable attorney fees. (Our emphasis.)

Under the decision of the California Supreme Court in Woodland Hills Residents Assn., Inc., supra, Civil Code §3496 applies retrospectively to all cases in which an appeal has not yet been finally determined when the statute becomes effective (Jan. 1, 1983) and therefore applies to this case. Construed in pari materia with C.C.P. §1021.5 and Govt. Code §38773 and §38773.5 (Petition for Writ of Certiorari at Appendix F-7, F-8), as it must, see Sutherland Statutory Construction, Vol. 2A, §51.03, "Statutes deemed to be in pari materia", Civil Code §3496 confirms Petitioner's arguments that the "public entities" exclusion in C.C.P. §1021.5 does not

preclude the award of a private attorney-general attorney's fee in this case and is solid authority for the proposition that such "rights adhere to a governmental unit". (See Brief in Opposition at page 9 where Respondent argues that Petitioner "cites no authority for the proposition that such rights adhere to a governmental unit rather than a individual").

The inclusive right of a city attorney to recover attorney's fees under the private attorney-general concept of C.C.P. §1021.5 is not difficult to understand for that is, in fact, how the city attorney functions in lawsuits involving police matters of statewide interests (obscenity). Under the Common Law, the Attorney-General was the only person authorized to abate public nuisances, Newark Health and Welfare Dept. v. Rogers, 179 N.J.Super. 389, 432 A.2d 135 at 139, People of the State of California v. Beaudry, 91 Cal. 213 at 215, 220 (Sept. 16,

1891). The City Attorney's authorization to perform that function is statutory (see C.C. §5 and §21, C.C.P. §731), as is the City Council's right to assess costs of abatement against the person who is maintaining the public nuisance. See Govt. Code §38773 and §38773.5, appearing in the Petition for Writ of Certiorari at Appendix F-7 and F-8 and Santa Ana Ordinance N.S. 1287 appearing in the Petition for Writ of Certiorari at Appendix B-105 and B-106.

Respondents' argument (see Brief in Opposition at page 9) that:

> ". . . denial of attorney's fees to him is the taking of property without due process of law, which must be one of the more specious arguments to be presented to this court this term."

misstates the argument which is made in Point IIB of the Petition. Point IIB addresses itself to "damages" not "attorney's fees". The argument there is predicated upon the assumption that a moral public nuisance does result in "harm" and

"damage". Since under the Court of Appeal's opinion and ruling California case law, a private property owner cannot recover for the "general" or "special" injury done to his property by the moral public nuisance, see Civil Code §3493 (Petition for Writ of Certiorari at Appendix F-6) and Harmer, et al. v. Deep Throat, 430 U.S. 907; Harmer, et al. v. Devil in Miss Jones, 430 U.S. 937, and the City Attorney cannot recover for the "general injury" done to the Community, it must therefore follow that such harm will go unrecompensed, and the same amounts to a "taking" of property without due process of law.

CONCLUSION

This Court should grant the writ as prayed for in the petition and set the case for oral argument on the merits.

DATED: October 1, 1982

Respectfully submitted,

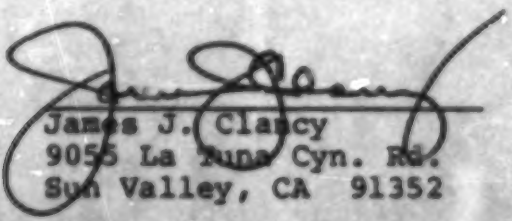
James J. Clancy
Attorney for Petitioner.

CERTIFICATE OF SERVICE

I, hereby certify that on this 4th day of October, 1982, the original and 40 copies of the within Reply and Supplemental Brief were deposited in the United States Post Office in Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

LAW OFFICE OF ROBERT L. THORP
1524 California Street
San Francisco, California 94109



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APPENDIX A

(Reference: Petitioner's Reply and Supplemental Brief at page 6.)

Point III (pages 10-13) of Petitioner's Reply and Supplemental Brief in People ex rel. Cooper, City Attorney of the City of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, No. 81-271, filed on Nov. 19, 1981.

. . . . . A-1 thru A-3.

III

AN APPEAL WAS PERFECTED IN U.S. MARKETING, INC. V. STATE OF IDAHO EX REL. KIDWELL, ET AL. ON OCTOBER 15, 1981 AND THAT CASE IS NOW DOCKETED IN THIS COURT AS NO. 81-741. ACCORDINGLY, THE FEDERAL QUESTION AS TO WHETHER AN EQUITY COURT HAS THE POWER TO CLOSE REAL PROPERTY FOR PAST WRONGFUL CONDUCT (AFTER A JUDICIAL DETERMINATION MADE PURSUANT TO CONSTITUTIONALLY ACCEPTABLE PROCEDURES THAT SUCH REAL PROPERTY HAS BEEN USED TO TRADE IN OBSCENITY AS A REGULAR COURSE OF BUSINESS AND IS A PUBLIC NUISANCE) IS NOW SQUARELY BEFORE THIS COURT FOR DECISION.

In its "Reasons for Granting the Writ", see Petition for Writ of Certiorari at page 48, Petitioner asked this Court to exercise its judicial discretion and grant the writ under Rule 17.1(b) of the United States Supreme Court on the ground that:

> ". . . a state court of last resort (California Court of Appeal, Fourth Appellate District, Division 2) has decided a federal question (closure of the premises) in a way in conflict with the decision of another state court of last resort (Idaho Supreme Court . . ."

Petitioner now calls this Court's attention to an intervening matter; i.e., that an appeal was perfected on October 15, 1981

from the Idaho Supreme Court decision referred to in the Petition for Writ of Certiorari, and has been docketed in this Court as U.S. Marketing, Inc. v. State of Idaho ex rel. Kidwell, et al., No. 81-741. In as much as this Court's jurisdiction over appeals is obligatory, see Frankfurter and Landis, The Business of the Supreme Court: A Study in the Federal Judicial System (1972), pp. 257, it would appear that the federal question of "closure" which has been presented to this Court under its discretionary jurisdiction in the Petition for Writ of Certiorari in People of the State of California ex rel. Cooper, City Attorney of the City of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, et al., No. 81-271 is now squarely before this court for decision in the Idaho appeal. Because both cases present the same issue (closure) and the same factual pattern (application of the injunction procedure is

not an issue on appeal) request is made that this Court exercise its discretion and grant the writ in the California case at the same time that it acts under its obligatory jurisdiction in the appeal from the Idaho Supreme Court decision.

In bringing to the attention of the members of this Court this matter of the perfecting of an appeal in the Idaho case, Petitioner respectfully requests that this Court not rule upon the Petition for Writ of Certiorari herein until it considers the Jurisdictional Statement in the Idaho Supreme Court appeal and that both cases be considered together, under this Court's customary practice of holding related cases on the Court's docket until a definitive decision has been reached, which can be applied to all of the related cases. See Supreme Court Practice, 5th Edition, Stern and Gressman, at page 750.

APPENDIX B

(Reference: Petitioner's Reply and Supplemental Brief at page 12.)

Point III (pages 38-43) of Plaintiff Edward Cooper, City Attorney of Santa Ana's Petition for Hearing in the California Supreme Court, filed on March 28, 1982, titled:

III

BY REFUSING TO ENFORCE THE PROVISIONS OF SANTA ANA ORDINANCE N.S. 1287 AND 1325, WHICH DECLARE THAT A PLACE WHICH PUBLICLY EXHIBITS OBSCENE MOTION PICTURE FILMS AS A REGULAR COURSE OF BUSINESS AND THE POSITIVE MOTION PICTURE PRINTS USED AT SUCH PLACES FOR SUCH EXHIBITIONS ARE PUBLIC NUISANCES, THE COURT OF APPEAL HAS USURPED THE LEGISLATIVE POWER OF THE CITY OF SANTA ANA.

. . . . . B-1 thru B-10.

III

BY REFUSING TO ENFORCE THE PROVISIONS OF SANTA ANA ORDINANCE N.S. 1287 AND 1325, WHICH DECLARE THAT A PLACE WHICH PUBLICLY EXHIBITS OBSCENE MOTION PICTURE FILMS AS A REGULAR COURSE OF BUSINESS AND THE POSITIVE MOTION PICTURE PRINTS USED AT SUCH PLACES FOR SUCH EXHIBITIONS ARE PUBLIC NUISANCES, THE COURT OF APPEAL HAS USURPED THE LEGISLATIVE POWER OF THE CITY OF SANTA ANA.

Having held (erroneously) that the City Attorney, as a matter of law, could not recover damages for a public nuisance under Civil Procedure section 731, the Court of Appeal's original opinion, which is adhered to upon remand, further reasoned that, except for the injunction, "the other remedies granted by the trial court" were unauthorized because "Inconsistent with the language of section 731." In addressing itself to the plaintiff's contrary arguments, the Court's analysis held that the only public nuisance was the exhibition of the obscene films in the theater: (Appendix B-9):

> "The City's arguments to the contrary appear to stem from an erroneous view of what constitutes the public nuisance that may be abated. . . It thus appears that the City believes that it is the theater that constitutes the public nuisance. This in an incorrect reading of the Busch decision. In Busch, the court states that 'the exhibition of obscene magazines and films . . . may be characterized as "indecent" or "offensive to the senses"' (17 Cal.3d at p. 49), talks about 'the state's interests in regulating the exhibition of obscene matter' (id., at p. 51), and concludes that 'public nuisance laws may properly be employed to regulate the exhibition of obscene material to "consenting adults."' (Id., at p. 53, emphasis added.) Thus, the public nuisance is not the theater, nor even the obscene films themselves. It is the exhibition of those obscene films in the theater that constitutes a public nuisance."

The ruling of the Court of Appeal, that the theater itself and the specific motion picture prints used to project the images and sounds at that theater in the City of Santa Ana are not public nuisances, refuses to acknowledge the legislative powers of the Santa Ana City Council and the specific grant of authority to cities in Government Code sections 38771 through 38773.5 to

declare what constitutes a public nuisance in that City and to provide for a procedure to abate such public nuisances. Such ruling is in derogation of Santa Ana City Ordinances N.S. 1287 and 1325 which declare places exhibiting obscene films within the City, and prints used to exhibit obscene films within the City to be a public nuisance, and the Court's refusal to enforce the Santa Ana Ordinances constitutes a usurpation of the legislative power of the City of Santa Ana. See City of Bakersfield v. Miller, 64 C.2d 93, 48 Cal.Rptr. 889 (Feb. 4, 1966), where this Court held, in that regard, at page 894:

> "Where the Legislature has determined that a defined condition or activity is a nuisance, it would be a usurpation of the legislative power for a court to arbitrarily deny enforcement merely because in its independent judgment the danger caused by a violation was not significant. The function of the courts in such circumstances is limited to determining whether a statutory violation in fact exists, and whether the statute is constitutionally valid."

In the City of Bakersfield case, supra, the City had adopted by reference the 1958 edition of the Uniform Building Code, drafted by the International Conference of Building Officials. The complaint filed by the City alleged that the Padre Hotel constituted a fire hazard and a public nuisance as defined by the city ordinance which had been enacted. The defendant did not deny that the ordinance had been violated but contended instead that the city exceeded its legislative powers in declaring as a matter of law that such violations constituted a public nuisance, and maintained that the trial court was required to make an independent finding as to whether the building was in fact a nuisance under state law. The people argued that the statutory definition of Civil Code section 3479 was not exclusive. The trial court agreed with the city's position, holding that it was "a proper function" of the

legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity and concluded that the hotel constituted a fire hazard within the meaning of the uniform code adopted by the city, and that under terms of section 203, subd. (a) of the code it was a public nuisance. Upon appeal, this Court affirmed, holding at page 894:

> "City legislative bodies are empowered by Government Code, section 38771 to declare what constitutes a nuisance. Since even without this section cities would have the power to abate public nuisances (Code Civ. Proc. § 731) and to impose criminal sanctions upon those maintaining public nuisances (Pen. Code, § 373a) It seems evident that Government Code section 38771 does more than permit cities to adopt as municipal ordinances provisions which have already been enacted as state statutes; such an interpretation would make the section superfluous. It may be contended that the section delegates to municipalities only the power to declare as nuisances specific conditions within the general areas of regulation enumerated in Civil Code, section 3479, but we do not reach this question here since a fire hazard clearly constitutes a nuisance within

the provisions of section 3479. (See, e. g., People v. Wing (1905) 147 Cal. 382, 383, 81 P. 1104; County of San Diego v. Carlstrom (1961) 196 Cal.App. 3d 485, 491, 16 Cal.Rptr. 667; Yen Eng v. Board of Building & Safety Comrs. (1960) 184 Cal.App.2d 514, 521, 7 Cal.Rptr. 564; Perepletchikoff v. City of Los Angeles (1959), 174 Cal.App.2d 697, 701, 345 P.2d 261.) Therefore, the City of Bakersfield has the power to define by statute the standards by which courts are to judge whether a nuisance exists, and the trial court did not err in refusing to decide this case on the basis of common law concepts or of the general provisions of Civil Code, section 3479." (Our emphasis.)

The grant of authority of Government Code section 38771, discussed in City of Bakersfield, supra, is clear. Under such section, the City Council, as the city's legislative body has the power to determine what activities within the City of Santa Ana exert a corrupting and debasing impact on the community's health, safety, convenience, good morals, and general welfare under the law of public nuisances and to prescribe with more certainty what constitutes a public nuisance. City of Bakersfield v.

Miller, supra; Barry v. City of Oceanside, 107 Cal.App.3d 257, 165 Cal.Rptr. 697, (June 19, 1980); See 35 Cal.Jur.2d Municipal Corporations, section 237. Acting pursuant to such authority, the Santa Ana City Council enacted Ordinance N.S. 1287 and 1325, treating with particularity the specific public nuisance discussed by the California Supreme Court in t'e Busch case, supra, which voiced the following public policy in 17 Cal.3d 42 at 55:

> "We do not suggest, of course, that law enforcement officers in each city and county in this state have a mandatory duty always and everywhere to abate the exhibition of obscene matter within their borders. The particular nature of the exhibition, and its effect upon the community, may vary considerably in time and place. Law enforcement officers accordingly are vested with wide discretion to decide whether or not to initiate the kind of formal abatement proceedings such as those instituted in the matters before us. (See Code Civil Proc., § 731.) Once a community through its public officials has determined that a particular display of obscene materials amounts to a public nuisance which is injurious to the safety and morals of that community, no valid reason exists

> why, adequate constitutional procedural safeguards being met, the remedy of civil abatement proceedings must be denied such community. The availability of the public nuisance procedure may prove useful for those local entities which, determining that they are confronted with commercial exploitation of obscene materials resulting in the conditions contemplated in section 370, elect to use it." (Our emphasis.)

In People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, 114 Cal.App.3d 923 at 930, 171 Cal.Rptr. 85 at 89; the Court of Appeal held that:

> ". . . the trial court erred . . . in ordering the destruction of the 11 films found to be obscene."

and at page 931:

> "Thus, the public nuisance is not the theater, nor even the obscene films themselves."

Plaintiff submits such ruling is erroneous in its failure to take into consideration: (1) The legal effect of section 12-102(B) of Santa Ana City Ordinance N.S. 1287, which declares such prints to be a public nuisance per se when exhibited publicly within the City of Santa Ana; and (2) the powers of a

Court of equity to declare a forfeiture of such subject matter as derivative contraband. See State of South Dakota v. Three ISO-2 Devices, 296 N.W.2d 510, 511 (Sept. 3, 1980); U.S. v. U.S. Coin and Currency, 401 U.S. 715; Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663.

The above rule of law fails to recognize and apply the logical distinction, which this Court noted in footnote 10 of its own opinion, between "the private possession of obscene films" and the fact that "obscene films do not become legally objectionable until they are publicly exhibited or distributed". Were such a rule of law to be applied herein, such would require the irrational result reached in the post trial proceedings below which required the plaintiff, after expending substantial moneys on the trial and prevailing on the obscenity issue, to return the obscene films and pay a rental for their use as exhibits

at the trial and upon appeal!

In using the above procedures, the Santa Ana City Council did not, in any way, interfere with statewide legislative matters, and such ordinances are entirely consistent with the public policy expressed in Busch and were valid legislative enactments within the City Council's authority. Under the City of Bakersfield case, supra, the Court of Appeal decision "to arbitrarily deny enforcement" constituted a "a usurpation of the legislative power of the City."

APPENDIX C

(Reference: Petitioner's Reply and Supplemental Brief at page 14.)

Point II (pages 33-38) of Plaintiff Edward Cooper, City Attorney of Santa Ana's Petition for Hearing in the California Supreme Court, filed on March 28, 1982, titled:

II

A CITY ATTORNEY IS EMPOWERED TO RECOVER MONETARY DAMAGES IN A CIVIL ACTION TO "ABATE" A PUBLIC NUISANCE UNDER CIVIL PROCEDURE SECTION 731.

. . . . . C-1 thru C-9.

II

A CITY ATTORNEY IS EMPOWERED TO RECOVER MONETARY DAMAGES IN A CIVIL ACTION TO "ABATE" A PUBLIC NUISANCE UNDER CIVIL PROCEDURE SECTION 731.

The original opinion of the Court of Appeal (as adhered to upon remand) is grounded upon the erroneous conclusion of law that a city attorney cannot recover damages for a public nuisance under Civil Procedure Section 731. See People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater, et al., 114 Cal.App.3d 923 at 930, 171 Cal.Rptr. 85 at 89. That analysis is in error. The statutory history of Code of Civil Procedure Section 731 shows that it was originally enacted into law in 1872 when the Field Code was adopted.[12/] At that time, the generic term "nuisance" was used-- no distinction was drawn between a "public"

12/ For the common law background of the law of "nuisance", see Prosser on Torts (3rd Edition) at page 592; Newark, The Boundaries of Nuisance, 1949, 65 L.Q. Rev. 480, 482; Stephen, General View of the Criminal Law of England, 1890 at 105; and H.G. Wood, The Law of Nuisances, discussed in Cross-Appellant's Opening Brief at page 235 et seq.

nuisance and a "private" nuisance. As enacted in 1872, Code of Civil Procedure Section 731 read:

> "Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered."

Section 731 was not amended until 1905.

Prior to 1905, Section 731 had been construed by the California Supreme Court in San Francisco v. Buckman (1896), 111 C. 25, 43 P. 396 to authorize the award of damages to a City Attorney where a public nuisance was shown to exist. In the Buckman case, the City and County Attorney of San Francisco had brought an action to restrain the defendants from tearing up a public street. The trial court found that the acts of the defendant constituted a public

nuisance and that the City was entitled to an injunction. Upon appeal, the California Supreme Court affirmed, holding that, under Civil Procedure Section 731, the City would be entitled to damages:

> ". . . it still is claimed for appellant that the 'proof shows at best only a naked trespass, and against such trespass equity will not grant an injunction.' This proposition cannot be maintained. The proofs show that appellant was committing more than mere trespass; he was unlawfully obstructing the free passage or use, in the customary manner, of a public street of the city, and this, under the provisions of the code, constituted a public nuisance. (Civ. Code secs. 3479, 3480.) And the Code of Civil Procedure expressly provides that a nuisance may be enjoined or abated and damages therefor recovered in the same action. (Civ. Code, sec. 731.)" (Our emphasis.)

In the 1905 amendment, the first sentence of Section 731, containing a definition of "nuisance" (which at that time, under the Field Code, was also contained in Civil Code Section 3479) was dropped from the Civil Procedure statute. To compensate for that omission, the word

"nuisance" in the second sentence was changed to read "nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code." In addition a new sentence was added to codify the common law right of the city attorney to bring an action to abate a public nuisance, which had previously been acknowledged in San Francisco v. Buckman as being a part of Section 731. After the 1905 amendment, Section 731 read as it does today:

> §731. (Right to bring action to enjoin or abate nuisance, and to recover damages; Abatement of public nuisance)
>
> An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any

> town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city.

See, also, Johnson v. V.D. Reduction Co., 175 Cal. 63 (1917), where the California Supreme Court held that the 1905 amendment was not intended to change rights which existed prior to the amendment, and was intended only to provide the statutory authority for the institution of civil actions for the abatement of public nuisances by municipal officers, at page 66:

> "Counsel for appellants, conceding, if accepted as the law, the decisive character of the Zumwalt case, attack it upon the ground that, while section 731 of the Code of Civil Procedure, as it then read, in express terms authorized any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance defined in section 3479 of the Civil Code, to sue for the abatement thereof, the effect of the amendment thereof, made in 1905, was to

deprive persons so injuriously affected of the right of action. Reference to the amendment shows an added clause, the sole purpose of which was to empower district attorneys and city attorneys of their own motion to institute civil actions for the abatement of public nuisances in counties and cities and to compel them so to do when directed by the legislative authorities of counties and cities. Clearly, it was not the intention of the legislature by enacting the amendment to abridge or affect the rights given by the section prior to the amendment to private persons in maintaining actions for the abatement of nuisances, whether of a private or public nature when the effect thereof seriously impairs their health, abridges their right to personal enjoyment, or renders their dwellings and homes unfit for occupation. Its only purpose was to provide statutory authority for the institution of civil actions for the abatement of public nuisances by municipal officers." (Our emphasis.)

The contrary construction given to Civil Procedure section 731 by the Court of Appeal flies in the face of Civil Procedure section 5 and Civil Code section 5 which require that:

"the provisions of this code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments."

(Our emphasis.)

See, also, Civil Code section 3484, enacted in 1872, which reads:

> "The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence."

Further, that Court's interpretation that a city attorney cannot recover monetary damages in an action to abate a public nuisance pursuant to Civil Procedure section 731 is contrary to ruling California case law. See People et al. v. City of Los Angeles, 160 C.A.2d 494 (May 15, 1958), petition for a hearing in the California Supreme Court denied on July 11, 1958. In the City of Los Angeles case, the cities of Manhattan Beach and Hermosa Beach brought an action against the City of Los Angeles alleging a public nuisance created within the boundaries of those cities caused by the discharge of sewage into the waters of Santa Monica Bay. There, the Court of Appeal, Second Appellate District, Division Three,

held that damages could be recovered under Civil Procedure section 731, at page 508:

> "The defendant city of Los Angeles attacks each of these causes of action upon the theory that they are causes of action for damages not incidental to the action to abate the nuisance and that inasmuch as there is no allegation that any claim was filed against the city in accordance with the provisions of the Charter of the city of Los Angeles (Los Angeles City Charter, §§363 and 376), a cause of action is not stated.
>
> "Each of the cities has the right to abate a nuisance existing within its boundaries (Civ. Code, §3494) and may by injunctive relief, accomplish such abatement (People v. Selby Smelting & Lead Co., 163 Cal. 84 at 90 (124 P. 692, 1135 Ann.Cas. 1913E 1267), and in any action brought to abate the nuisance, may not only enjoin its continuance, but recover damages. (Code Civ. Proc. §731.) Inasmuch as each of these causes of action, although repetitious insofar as injunctive relief is concerned, is sufficient to state a cause of action for an injunction, it was error to sustain a general demurrer to either. We are not called upon to decide whether any of the facts alleged as constituting damage to the respective cities, do in fact show damages which are recoverable against the city, for this is a question to be decided upon a motion to strike from the pleadings, or upon objections to the evidence thereof when offered. We may say, however, that any proper item of damage which is a direct result of the creation of the

> nuisance and incident to any equitable relief that may be granted, may be recovered in this action even though no claim therefor was filed against the city prior to the institution of the action. (Los Angeles Brick etc., Co. v. City of Los Angeles, 60 Cal.App.2d 478 at 486 (141 P.2d 46); Ingram v. City of Gridley, 100 Cal.App.2d 815 at 818 (224 P.2d 798)." (Our Emphasis.)

See, also, People ex rel. Van de Kamp v. American Art Enterprises, Inc., et al., ___ Cal.App.3d ___, 177 Cal.Rptr. 776 (Oct. 27, 1981). Hearing granted on Feb. 5, 1982.

The statutory analysis set forth above confirms plaintiff's common law analysis in its previous briefs on file with this Court that, under Civil Code section 14 and Civil Procedure section 17, the word "person" as used in Civil Procedure section 731 includes a municipal corporation as well as a natural person.